CECC-K 1 April 1991

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: "No Records" FOIA Appeals

1. The Army General Counsel has issued the enclosed changes to AR 25-55. This guidance establishes a formal procedure for processing appeals when no records have been located.

2. When a district can not find any documents responsive to a request, they must now send a recommended denial to their IDA. Districts should process this type of request and denial just as they would a denial based on one of the exemptions. Districts should notify the requester that they could not find any documents responsive to the request and that they are forwarding the action to the IDA for a formal decision.

3. IDA's must issue a formal denial letter, indicating that no documents were located and advising the requester of the right to appeal.

4. Requesters will be notified to send appeals based on "no records" determinations to CECC-K. Upon receipt of an appeal letter CECC-K will request that the district conduct another search and certify in writing that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Details must be provided. CECC-K will forward the certification to the Army General Counsel along with the appeal package.

FOR THE COMMANDER:

Enclosure

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14 March 1991

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: "No Records" FOIA Appeals

At present, AR 25-55, paragraph 5-300, states that a Freedom of Information Act (FOIA) requester may not appeal an Initial Denial Authority's (IDA) finding that it has no records responsive to a request. This rule stemmed from the Army's position that a "no records" response was not an "adverse determination" authorized for appeal under 5 U.S.C. §552(a)(6)(A)(i).

However, in Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990), the court held that a "no records" response is an "adverse determination" under 5 U.S.C. §552(a)(6)(A)(i). The Court of Appeals reasoned that such a response is "adverse" because the requester does not receive the documents it requested. 920 F.2d at 67. As a result, a requester wishing to challenge the adequacy of an IDA's search must have the opportunity to appeal a "no records" response to the head of the agency.

The Oglesby decision has important consequences for Army officials designated IDAs by AR 25-55. First, since a "no records" response is an "adverse determination", an IDA rather than a document custodian should be the official which informs the requester that no records exist. Second, IDAs must inform requesters that they have the right to an administrative appeal of a "no records" finding.

Upon an IDA's receipt of such an appeal, the IDA or records custodian shall conduct another records search and certify in writing to the Office of the General Counsel (OGC) that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." See, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). To meet this standard, the certification should contain details regarding the terms or files searched and the search methods used. Oglesby, 920 F.2d at 68. After the appropriate official has completed this second records search, the IDA should forward the certification and the appeal to OGC. (Of course, IDAs and records custodians should strive to meet the Weisberg and Oglesby standards when conducting their initial searches.)

By referring to this certification when responding to administrative appeals, OGC can satisfy most requesters' concerns about the adequacy of agency searches. Moreover, detailed certification would form the basis for affidavits which can help the Army obtain summary judgment against those requesters who appeal to the courts. IDAs should disseminate this guidance to records custodians which hold records within the IDAs' functional responsibility.

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